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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 UNITED STATES OF AMERICA,

4 v.

23 Cr. 490 (SHS)

5 ROBERT MENENDEZ, NADINE  
6 MENENDEZ, WAEL HANA, and  
FRED DAIBES,

7 Defendants.

Decision

8 -----x  
9 New York, N.Y.  
April 11, 2024  
10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 11:00 a.m.

Before:

HON. SIDNEY H. STEIN,

District Judge

APPEARANCES

DAMIAN WILLIAMS

United States Attorney for the  
Southern District of New York

BY: DANIEL C. RICHENTHAL

ELI J. MARK

PAUL M. MONTELEONI

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Attorneys for Defendant Robert Menendez

BY: ADAM FEE

AVI WEITZMAN

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## 1 APPEARANCES (Cont'd)

2 SCHERTLER ONORATO MEAD & SEARS, LLP  
3 Attorneys for Defendant Nadine Menendez  
BY: DAVID SCHERTLER4 GIBBONS, PC  
5 Attorneys for Defendant Hana  
BY: LAWRENCE S. LUSTBERG  
6 ANNE M. COLLART  
RICARDO SOLANO, JR.7 THE LAW FIRM OF CESAR DE CASTRO, P.C.  
8 Attorneys for Defendant Daibes  
BY: CESAR DE CASTRO  
SETH H. AGATA  
SHANNON M. McMANUS

10 VALERIE A. GOTLIB (via telephone)

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1 (In open court; case called)

2 THE DEPUTY CLERK: Counsel, please state your names  
3 for the record.

4 MR. RICHENTHAL: Good morning, your Honor. Daniel  
5 Richenthal for the government. With me is Eli Mark, Paul  
6 Monteleoni, and Lara Pomerantz.

7 THE COURT: Good morning.

8 MR. FEE: Good morning, your Honor. For Senator  
9 Menendez, Adam Fee and Avi Weitzman. Your Honor, our client  
10 has waived his appearance today.

11 THE COURT: You have spoken with him about this and he  
12 waives his appearance?

13 MR. FEE: Correct, your Honor.

14 THE COURT: I accept that.

15 MR. LUSTBERG: Good morning, your Honor. Lawrence S.  
16 Lustberg, from Gibbons PC, on behalf of Defendant Wael Hana.  
17 With me are my partners Anne Collart and Ricardo Solano.  
18 Mr. Hana has also, after full consultation with us, waived his  
19 appearance for purposes of today's proceeding.

20 THE COURT: That's fine. We are only going to be  
21 dealing with legal matters and trial scheduling, nothing  
22 factual.

23 MR. LUSTBERG: Thank you.

24 MR. DE CASTRO: Good morning. Cesar de Castro. I am  
25 joined by Seth Agata and Shannon McManue for Fred Daibes. He

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1 has also waived his appearance today, and we have spoken to him  
2 about it.

3 THE COURT: Please be seated.

4 MR. SCHERTLER: Your Honor, David Schertler on behalf  
5 of Nadine Menendez. And Ms. Menendez also waives her  
6 appearance for this proceeding.

7 THE COURT: And you have spoken with her about it?

8 MR. SCHERTLER: Yes.

9 THE COURT: Welcome. Please be seated.

10 I have decisions on the pending motions. I am going  
11 to deliver them orally rather than in written form. It will  
12 save me a lot of time, and I think it's to the parties'  
13 advantages to have it early.

14 What I propose, but I won't do it without the consent  
15 of the parties, is that I read the opinion and give the case  
16 name, but not the actual citation. And the reporter will put  
17 the citation in from my notes, but I will read the case name.  
18 I won't do that if people disagree.

19 Government.

20 MR. RICHENTHAL: I think that's sensible, your Honor.

21 MR. FEE: Please, your Honor.

22 MR. LUSTBERG: No objection.

23 MR. DE CASTRO: No objection.

24 MR. SCHERTLER: No objection.

25 THE COURT: It will save everybody time in the

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1 courtroom. That's for sure.

2 A lot has been happening in the last couple of days,  
3 and I have requests for adjournment of the trial, which is set  
4 for May 6, and severance, and requests to go to trial. So  
5 let's handle that at the beginning.

6 This was sparked by a medical issue with Mrs.  
7 Menendez. And, Mr. Schertler, please pass on the concern of  
8 the Court and the hope for a speedy recovery.

9 MR. SCHERTLER: Yes, I will.

10 THE COURT: Why don't you start off. What is your  
11 position on the May 6 trial date?

12 MR. SCHERTLER: For the reasons that we have submitted  
13 to the Court in writing, we would ask for an adjournment of the  
14 trial date with respect to Nadine Menendez.

15 THE COURT: Until when?

16 You want it *sine die* because the medical issues are  
17 uncertain at this time.

18 MR. SCHERTLER: That's correct. We think the most  
19 prudent course would be to set a status hearing in two months'  
20 time to see what the medical condition is at that time and when  
21 Ms. Menendez could sit for trial.

22 THE COURT: As of now, do you have a view as to when  
23 it's likely for her to be able to sit for trial or too early to  
24 tell?

25 MR. SCHERTLER: Your Honor, it's just too early to

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1 tell, especially for me, without any medical background. And  
2 what we understand is that there needs to be more information  
3 that will be garnered from additional tests and additional  
4 procedures. So in two months' time we expect to know a lot  
5 more.

6 THE COURT: Thank you.

7 Mr. Fee.

8 MR. FEE: Your Honor, our position is clear. The  
9 Court denied the one and only request for an adjournment that  
10 Senator Menendez made.

11 THE COURT: You made a request for an adjournment  
12 because you wanted additional time; you said you needed, I  
13 think it was two months from May 6 to prepare, if I remember.

14 MR. FEE: We don't need it anymore, your Honor, and we  
15 don't want it. Since that day, when the Court said May 6 is  
16 the trial date, we have directed all of our resources to  
17 getting ready. We are ready.

18 Two points, your Honor. One, every day that the  
19 specter of the unproven allegations are in the air as to our  
20 client is a detriment to him, and it could effectively remove  
21 his ability to run in the general election; every day of delay  
22 is prejudicial to him. So we want to go on May 6, your Honor.

23 The second point, your Honor, given the issues that  
24 have arisen with Mrs. Menendez, we think that a severance is  
25 almost inevitable of her, unless the Court is prepared to order

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1 a very lengthy adjournment of the trial.

2 THE COURT: Well, that I certainly don't want. But  
3 why do you say that, based on the information we have? And the  
4 details are appropriately sealed, but what can you say?

5 MR. FEE: The issue that the government omits from its  
6 letter is that there is now a pending motion to withdraw by her  
7 trial counsel, your Honor. I don't know how the Court is going  
8 to deal with that. But if there is a new counsel --

9 THE COURT: The motion to withdraw is based on an  
10 actual conflict.

11 MR. FEE: Correct, your Honor.

12 THE COURT: I don't have much choice if there is an  
13 actual conflict.

14 MR. FEE: Therefore, she is going to have two issues  
15 that are going to require significant time. One, the medical  
16 issue, and two, a brand-new counsel who is entering at the time  
17 when she is dealing with these other issues.

18 So, I think it's hollow to suggest that a trial date  
19 for all the defendants is remotely plausible in July or August.  
20 Senator Menendez wants his May 6 trial, your Honor, and we  
21 think it actually speaks to the public and the defendants'  
22 rights here, because this is a sitting U.S. senator who has to  
23 deal with these allegations.

24 THE COURT: But, again, you recently asked for an  
25 adjournment.

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1                   MR. FEE: Your Honor, that was not recently. That was  
2 at the beginning of this case. You said no. You said May 6 is  
3 the date. We listened. We are ready, and we are asserting our  
4 speedy trial right. We want to go on May 6, your Honor. And  
5 we think an adjournment to July, unless the Court is going to  
6 sever, is really an adjournment beyond July to the fall.

7                   THE COURT: Why?

8                   MR. FEE: Because of the need, the likelihood --

9                   THE COURT: Both counsel and you're saying the  
10 likelihood of additional medical requests; is that your point?

11                  MR. FEE: Even putting aside additional medical  
12 issues. New counsel for Mrs. Menendez, plus the medical  
13 issues, in my view, makes her going forward in July very  
14 unlikely.

15                  THE COURT: Thank you.

16                  MR. RICHENTHAL: Can I respond briefly, your Honor?

17                  THE COURT: Of course.

18                  MR. RICHENTHAL: 36 days ago, on March 6 --

19                  MR. LUSTBERG: One second. Are you going to hear from  
20 the other defendants?

21                  THE COURT: Let's hear from the defendants.

22                  Mr. Lustberg.

23                  MR. LUSTBERG: If I may, like Mr. Fee, we have in the  
24 past questioned going to trial so quickly, in fact, recently.  
25 But we, like him, have worked very hard and will be ready on

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1 May 6, and we too want to go to trial on May 6.

2 Let me raise two issues with your Honor. The first is  
3 that Mr. Hana, as the Court is well aware, his wife and  
4 children are in Egypt. He is unable to travel back and forth  
5 to Egypt to see them.

6 THE COURT: I thought when we first met, I thought the  
7 representations were that he was going to bring them here  
8 because there were issues about likelihood of appearing in  
9 court and so forth.

10 MR. LUSTBERG: And they are not being permitted to  
11 travel here; they are not being permitted to leave Egypt. I  
12 don't know the details of that, but I can tell you that he  
13 would love for them to be here and they can't come. So that's  
14 a hardship. But beyond that hardship, your Honor, he is not a  
15 US senator, but the pendency of this matter is devastating to  
16 his business, and may in fact destroy it. He just wants to get  
17 this thing going.

18 I want to raise, though, your Honor, another issue  
19 that I just want you to be aware of.

20 THE COURT: Wait. I assume from the public records  
21 his business is importing halal certified meat into Egypt.

22 MR. LUSTBERG: Right.

23 THE COURT: Why is this trial devastating to that  
24 business? And he has a monopoly on it, or at least in the  
25 record he does.

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1                   MR. LUSTBERG: Which is being questioned as a result  
2 of these charges.

3                   THE COURT: Questioned where, by whom?

4                   MR. LUSTBERG: I think some of this is information  
5 that is not public, so I am a little wary, but let me tell you  
6 what I can. It would not be surprising to know that those who  
7 would prefer to have this contract are using this indictment  
8 against him in an effort to achieve that.

9                   THE COURT: Okay.

10                  MR. LUSTBERG: But there is another logistical  
11 problem, which I alerted the Court to in my very first letter  
12 on this way back in the fall. I had another trial in the  
13 federal district court for the District of New Jersey scheduled  
14 for May 6, before Michael Farbiarz. Judge Farbiarz, because  
15 this trial date had been set earlier, adjourned that trial  
16 until September 9. And he now has set that trial for September  
17 9. And I am very concerned that if this case were to go up  
18 until the summer, that would run into September 9, or to go up  
19 to the fall, which I think it very well could in light of the  
20 concerns that Mr. Fee has raised, that I am going to run into  
21 that conflict. That was a case that was indicted in February  
22 of 2019. So it's a very old case, and there have been efforts  
23 made to move it, and Judge Farbiarz was very kind to adjourn  
24 the May 6 trial date in order to accommodate this case and your  
25 Honor's schedule. He also said at the time that the reason he

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1 did that is because this trial date had been set earlier. But  
2 I do not think that is going to be willing to move it again.

3 THE COURT: I think he will move it again, but I am  
4 not terribly concerned about that.

5 MR. LUSTBERG: I just want to raise it with the Court  
6 because depending on what the Court does, it may raise an  
7 issue. Look, as I said to him, I will be wherever the two of  
8 you decide I have to be, but I can only be --

9 THE COURT: The two of us will decide, don't worry.  
10 Thank you.

11 Mr. De Castro.

12 MR. DE CASTRO: Thank you, Judge. We submitted a  
13 letter last night I think with our position, which is that we  
14 could use time, we certainly could use an additional amount of  
15 time. If you're asking me now when, I would say late June,  
16 early July would be preferable for Mr. Daibes.

17 THE COURT: Thank you.

18 Let me hear from the government.

19 MR. RICHENTHAL: Your Honor, 36 --

20 THE COURT: I am concerned -- well, more than 30  
21 seconds. I am concerned about Mr. Fee's point on the new  
22 counsel coming in for Mrs. Menendez and needing to get up to  
23 speed.

24 MR. RICHENTHAL: I am happy to talk about that. I  
25 wasn't going to say 30 seconds. I was going to say 36 days.

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1 On March 6, 2024, at docket 240, every defendant, including Mr.  
2 Menendez, in a letter written by Mr. Hana's counsel, said that  
3 our position on May 6—and this is a quote—"was divorced from  
4 reality" and that the trial --

5 THE COURT: You're quoting and saying "our position."  
6 The government's position?

7 MR. RICHENTHAL: Yes.

8 THE COURT: These are the defendants saying the  
9 government's position of going on May 6 is divorced from  
10 reality.

11 MR. RICHENTHAL: Yes.

12 THE COURT: There's gamesmanship here, but I am trying  
13 try to look through the gamesmanship and figure out what is  
14 best under the law and *Zafiro*, and also the need for new  
15 counsel to come on, and the need for the Court to set, in the  
16 interests of all the parties, and the public, a trial date that  
17 can be adhered to.

18 So go ahead.

19 MR. RICHENTHAL: That's exactly our position. The  
20 reason I was referring to what happened 36 days ago is that  
21 there is gamesmanship. Only one thing has happened in the past  
22 36 days that's relevant, is that Ms. Menendez has an unforeseen  
23 medical condition. And while a party is entitled to change his  
24 or her position for perceived tactical advantage, that is what  
25 is happening here. Under *Zafiro* and *Richardson*, and lots of

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1 other case law, there is a standard for severance. It's  
2 stringent. It's exceedingly difficult to meet. It is not met  
3 for any number of reasons, for example, the evidence may be  
4 only close to one defendant, or defendants may point their  
5 fingers at each other, and it is not met here.

6 To go to the point about Ms. Menendez, I agree there  
7 is a possibility—of course there is—that we may have to sever  
8 this case. We said that in our letter.

9 THE COURT: That's the last thing I want if I adjourn  
10 it and then it has to be severed.

11 MR. RICHENTHAL: We agree, which is why we proposed  
12 the dates we proposed. But just to be clear, we are having  
13 this conversation on April 11. If for the sake of argument  
14 your Honor were to set a trial in, say, June or July, that's 8  
15 or 12 weeks from now. Ms. Menendez's new counsel will have 8  
16 to 12 weeks to get up to speed, in a case that has been  
17 exceedingly well briefed --

18 THE COURT: They need to be brought on also.

19 MR. RICHENTHAL: I can't speak to Ms. Menendez's  
20 retention of counsel, where she is in that process. All I know  
21 is that, at least in my experience, and in my view of this  
22 record, 8 to 12 weeks—and that's just an estimate—should be  
23 more than sufficient to be ready for trial.

24 Remember, her current counsel unfortunately does  
25 appear to face a conflict, but they are not disappearing. They

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1 are ready to try this case in four weeks, indeed, less than  
2 four weeks. Particularly with their assistance, and I am not  
3 aware of any reason why they can't assist new counsel, 8 to 12  
4 weeks is more than sufficient. And again, I am estimating 8 to  
5 12. The Court hasn't made any decision. So I just think  
6 that's speculative, and we shouldn't be moving on the  
7 assumption of what is going to happen in 8 weeks, or 12 weeks,  
8 or 10 weeks, or 16 weeks.

9                 The law has a stringent standard. It is not met. And  
10 again, a defendant is entitled to change his or her position,  
11 but the law hasn't changed, and severance is unwarranted on  
12 this case; and indeed, severance here would have the  
13 particularly serious impacts on efficiency, on resources, and  
14 on fairness that the Supreme Court has long cautioned against.

15                 THE COURT: Mr. Fee.

16                 MR. FEE: Your Honor, the other thing that happened  
17 since that letter was submitted is that the Court said May 6 is  
18 the trial date. We have gotten ready for May 6. It is not  
19 realistic what the government is proposing. They are saying we  
20 will check in in July and we will see what happens.

21                 THE COURT: No. I thought they were saying set a July  
22 date. That's what has been in the papers back and forth.

23                 What does the government say?

24                 MR. RICHENTHAL: Absolutely. We want a firm trial  
25 date. We are ready to try this case on any schedule the Court

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1 submits. Indeed, just to give an example. The requests to  
2 charge are due tomorrow. We have already drafted them and sent  
3 them to the defense. We are ready to try this case. We want  
4 to try this case. What we don't want to do is try this case  
5 twice, which we don't think is appropriate under the law and  
6 appropriate on the record of this case. That's what we are  
7 resisting. We want a firm trial date.

8 MR. FEE: Your Honor, we have a firm trial date. It's  
9 May 6. The idea that we are just going to kick it for two  
10 months, when it's a certainty that Mrs. Menendez will be unable  
11 to proceed in July.

12 THE COURT: How do you say that?

13 MR. FEE: Your Honor, it's not realistic. Given the  
14 issues in the sealed declaration, and given that she is going  
15 to have new counsel, despite Mr. Richenthal's belief that  
16 anyone could get up to speed on this case in eight weeks, even  
17 with the assistance of another lawyer, is not realistic.

18 THE COURT: I think that part is.

19 MR. FEE: I think you're going to have another problem  
20 you are going to have to deal with if you think there will be a  
21 severence in July.

22 We have a May 6 trial date, your Honor. The  
23 government didn't have to charge this case when it did. It  
24 didn't have to oppose an adjournment at every step of the way.

25 THE COURT: Again, to say what the government was

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1 saying, when you were advocating for an adjournment at every  
2 step of the way.

3 MR. FEE: We listened to your rulings, your Honor.  
4 You were crystal clear that May 6 is the trial date. The  
5 Senator and his legal team have organized their lives around  
6 May 6, and every day that these unproven allegations continue  
7 to hang in the air is prejudicial to the defendant. Mr.  
8 Richenthal's argument, the government's argument, is a  
9 convenience and efficiency of the government, your Honor. The  
10 defendant has a right to a speedy trial and that is what we are  
11 asserting, in line with the Court's absolutely crystal clear  
12 direction that May 6 --

13 THE COURT: Your codefendants are seeking additional  
14 time.

15 MR. FEE: One codefendant, who is newer to the case  
16 than the rest of us, your Honor. Senator Menendez and his team  
17 have been here since the day it was charged, and we are ready  
18 to proceed, your Honor.

19 MR. SCHERTLER: Your Honor, may I add a quick point?

20 THE COURT: Yes.

21 MR. SCHERTLER: I just think it's unrealistic to  
22 expect that new attorneys could be ready within 8 to 12 weeks  
23 given the volume of discovery in this case. We are talking  
24 about complex charges that cover a period of time of five  
25 years, in which there are tens of thousands of relevant and

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probative text messages, e-mails, voice mails. I am not sure that an attorney would actually take on Ms. Menendez's case if they had to go to trial within 8 to 12 weeks. I understand what Mr. Richenthal is saying, but I think everybody on the defense side would agree that that's just unrealistic. No attorney could do that.

MR. LUSTBERG: Judge, I just want to address one thing your Honor said. There is absolutely, from our perspective, zero gamesmanship. Like Mr. Fee, when we asked for more time, the Court denied it and --

THE COURT: I have a different view of gamesmanship, but I don't think it really matters. Thank you, sir.

I think given the medical issues it's quite uncertain as to when we will go to trial. I can't speak to new counsel. I do think counsel can get up to speed. I don't know when she is going to hire new counsel. I am going to stick with the May 6 trial date. The Court will have to try this case twice. The parties will have to try this case twice.

Given the medical issues, I am going to sever Mrs. Menendez. I am going to set Mrs. Menendez down for a July 8 trial date. We will have a conference in June to see whether that's realistic or not. Let's set Monday, June 3, at 10 a.m. to understand whether or not we can go to trial on July 8. This trial is going forward without Mrs. Menendez. It's unfortunate given the public policy concerns behind the *Zafiro*

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1 case. But in order to give some stability and, certainty is  
2 the word I'm looking for, to all the parties, we are going to  
3 trial on May 6. That's my decision.

4 MR. RICHENTHAL: Your Honor, two small matters, if I  
5 may.

6 THE COURT: Yes.

7 MR. RICHENTHAL: First, can July 8 be a control date?  
8 Because there are, for example, disclosures triggered by a  
9 trial date that may not come to pass, and I think it would be  
10 more appropriate for the parties to confer about them.

11 THE COURT: Sure. Absolutely. July 8 will be, you  
12 call it a control date, I call it trial date, but the Court  
13 understands it may slide. Indeed, a significant part of the  
14 Court's decision to have us go forward on May 6 is the  
15 substantial uncertainty in Mrs. Menendez's medical situation.  
16 I will leave it at that. Everybody, including the government,  
17 deserves some certainty here.

18 MR. RICHENTHAL: Understood. And the second point  
19 related to May 6, and I didn't mention this earlier.

20 THE COURT: I don't think anybody wants to try this  
21 case twice, but the parties are entitled to certainty.

22 MR. RICHENTHAL: Understood. And when I said that we  
23 don't want to try the case twice, I was referring to lay  
24 witnesses and the public as well, not just the government. We  
25 are always ready.

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I want to mention something about May 6 that I didn't mention a few minutes ago. I think it matters, and I was going to mention it regardless, but it wasn't part of the colloquy with counsel. We have been working extremely hard to come up with a stipulation that would not require Mr. Lustberg to be disqualified.

THE COURT: Mr. Lustberg?

MR. RICHENTHAL: Mr. Lustberg, correct, your Honor. If the Court remembers, there was a *Curcio* hearing.

THE COURT: I do remember.

MR. RICHENTHAL: We are working on a stipulation to get around the issues that were talked about in that *Curcio*. We have largely reached an agreement, indeed, we essentially have reached an agreement with Mr. Hana's counsel, but I want to flag two points related to that.

First, all the other defendants have to agree. Otherwise, it doesn't work, and we can't have a stipulation that only one defendant signs. Second, while the agreement that I am referring to is indeed an agreement, it's an agreement as to what Mr. Lustberg would testify to; it's not an agreement as to admissibility. And the parties have very different views, perhaps reasonably, about different portions thereof of the stipulation, which would have to be litigated potentially in advance of trial. That we can do. But the first issue, that all defendants have to agree, is quite real.

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1 We will continue to work to seek that agreement, but I just  
2 want to flag it for the Court, because absent it, unless I am  
3 grossly misreading the law, Mr. Lustberg would have to be  
4 disqualified, which obviously will affect the May trial date.

5 THE COURT: The Court was working on the assumption  
6 that that was fairly easy to work out—that is that  
7 stipulation—but apparently not. Keep me apprised.

8 MR. RICHENTHAL: It's been harder than anticipated,  
9 but not for the fault of Mr. Lustberg, and I hope and assume we  
10 will get there, but I wanted the Court to be aware we don't yet  
11 have agreement from all defendants.

12 THE COURT: Thank you.

13 MR. LUSTBERG: We have worked hard and we have a  
14 stipulation, but the other defendants have to agree to it as  
15 well.

16 MR. WEITZMAN: Your Honor, I will just say, we are  
17 available to talk to the government at any point about the  
18 stipulation; they have not reached out to us. We are happy to  
19 confer with them, and we will do so. We have been conferring  
20 with Mr. Lustberg, but we are happy to talk to the government  
21 directly.

22 MR. RICHENTHAL: We have reached out to all  
23 defendants, your Honor, although I don't think we need to get  
24 to the back-and-forth that proves the point I just made.

25 THE COURT: We don't. And I think I may have been

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1 saying May 8. This trial is set for May 6. I misstated it if  
2 I said May 8.

3 Mr. Schertler, I am not relieving your firm. I will  
4 not have Mrs. Menendez be unrepresented. So you are to  
5 continue to represent her. By the same token, she is to obtain  
6 new counsel within 30 days. All right?

7 MR. SCHERTLER: Yes, sir.

8 THE COURT: And I will expect a notice of appearance  
9 on behalf of new counsel within 30 days.

10 The motions that I intend to deal with include a  
11 motion to dismiss for failure to adequately allege venue, a  
12 motion to transfer venue to the District of New Jersey, motions  
13 for bills of particular, motions to sever—the motions to sever  
14 by Senator Menendez vis-a-vis Mrs. Menendez and by Mrs.  
15 Menendez vis-a-vis Senator Menendez are mooted by the fact that  
16 I have severed her from this May 6 trial—a motion by Mr. Hana  
17 to dismiss a count and strike part of the indictment, motions  
18 to dismiss for failure to allege an official act and a *quid pro*  
19 *quo*, motions for duplicity, and motions for multiplicity. So  
20 let's start.

21 Each defendant has -- and I am including Mrs. Menendez  
22 when I say each defendant. Each defendant has moved to dismiss  
23 the S4 indictment for inadequately alleging venue.

24 At trial, the government "bears the burden of proving  
25 venue by a preponderance of the evidence." *United States v.*

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1       *Lange*, 834 F.3d 58, 69 (2d Cir. 2016). But on a pretrial  
2 motion to dismiss, "the government need only allege that  
3 criminal conduct occurred within the venue, even if phrased  
4 broadly." *United States v. Ohle*, 678 F.Supp.2d 215, 231  
5 (S.D.N.Y. 2010) (quoting *United States v. Bronson*, No.  
6 05-cr-714, 2007 WL 2455138, at \*4 (E.D.N.Y. Aug. 23, 2007)).  
7 Language in the indictment that offenses were committed "within  
8 the Southern District of New York and elsewhere" is sufficient  
9 to support venue at the pretrial stage, as innumerable courts  
10 in this district have held. See *United States v. Dupigny*, No.  
11 18-cr-528, 2019 WL 2327697, at \*4 (S.D.N.Y. May 30, 2019); see  
12 also *United States v. Elcock*, No. 07-cr-582, 2008 WL 123942, at  
13 \*3 (S.D.N.Y. Jan. 10, 2008).

14           When a defendant is charged in more than one count,  
15 venue must be proper with respect to each count. *United States*  
16 *v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1188 (2d Cir.  
17 1989); see also *United States v. Rutigliano*, 790 F.3d 389, 396  
18 (2d Cir. 2015). Thus, at the pretrial stage, venue is  
19 adequately alleged as long as each count alleges, at a minimum,  
20 a statement that the offenses were committed within the  
21 Southern District of New York and elsewhere. The question of  
22 whether there is sufficient evidence to prove venue by a  
23 preponderance of the evidence is, as all of you know, a  
24 question for the jury at the conclusion of the trial.

25           "In reviewing a motion to dismiss an indictment, the

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1 court must take the allegations of the indictment as true."

2 *United States v. Avenatti*, 432 F.Supp.3d 354, 360-61 (S.D.N.Y.  
3 2020) (citing *Boyce Motor Lines v. United States*, 342 U.S. 337,  
4 343 n.16 (1952)).

5 For each of the 18 counts in the S4 indictment—and  
6 all of these motions, ladies and gentlemen, deal with the S4  
7 indictment—the government specifically alleges that the  
8 offense relevant to the count was committed "in the Southern  
9 District of New York and elsewhere." As I said, this meets the  
10 standard for sufficiently alleging venue before trial. The  
11 standard merely requires the government include language in the  
12 indictment that the offenses were committed within the Southern  
13 District of New York and elsewhere. See *Dupigny*, 2019 WL  
14 2327697, at \*4. The government has done exactly that, and has  
15 properly done so for each count in the S4 indictment.

16 The government has met the pretrial standard for  
17 alleging that venue lies in the Southern District of New York.  
18 To the extent each defendant's motion seeks to dismiss the  
19 indictment for lack of venue, those motions are denied.

20 Now there is also a motion to transfer venue to the  
21 District of New Jersey, just across the river. I am not quite  
22 sure why either the motion for failure to allege venue and the  
23 motion to transfer venue were actually made, but the defendants  
24 are entitled to make these motions. I am denying this motion  
25 as well.

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1                   Mr. Menendez has moved to transfer venue and Mr.  
2 Daibes, Mr. Hana, and Mrs. Menendez have joined in that motion.

3                   Rule 21(b) of the Federal Rules of Criminal Procedure  
4 provides that "upon the defendant's motion, the court may  
5 transfer the proceeding, or one or more counts, against that  
6 defendant to another district for the convenience of the  
7 parties, any victim, and the witnesses, and in the interest of  
8 justice." Disposition of Rule 21(b) motions are "vested in the  
9 sound discretion of the district court." *United States v.*  
10 *Maldonado-Rivera*, 922 F.2d 934, 966 (2d Cir. 1990).

11                  When deciding a Rule 21 motion, the district court  
12 considers the factors set forth in *Platt v. Minnesota Mining &*  
13 *Mfg. Co.*, 376 U.S. 240, 243-44 (1964). These factors are:

14                  (1) location of defendants; (2) location of possible  
15 witnesses; (3) location of events likely to be in issue; (4)  
16 location of documents and records likely to be involved; (5)  
17 disruption of defendant's business unless the case is  
18 transferred; (6) expense to the parties; (7) location of  
19 counsel; (8) relative accessibility of place of trial; (9)  
20 docket condition of each district involved; and (10) any other  
21 special elements which might affect the transfer.

22                  That's from the *Platt v. Minnesota Mining & Mfg. Co.*  
23 case, 376 U.S. at 243-44. In that case, the issue of  
24 disruption of defendant's business was really addressed to a  
25 corporate business and is not directly relevant to this case.

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1 "No one of these considerations is dispositive, and it remains  
2 for the court to try to strike a balance and determine which  
3 factors are of greatest importance." *Maldonado-Rivera*, 922  
4 F.2d at 966 (quoting *United States v. Stephenson*, 895 F.2d 867,  
5 875 (2d Cir. 1990)).

6 As I have said, this Rule 21(b) motion is addressed to  
7 the discretion of the trial court, and defendants bear the  
8 burden of justifying a Rule 21 transfer. See *United States v.*  
9 *Datta*, 797 F.Supp.2d 448, 450 (S.D.N.Y. 2011). "That burden is  
10 not often or easily met. To warrant a transfer from the  
11 district where an indictment was properly returned, it should  
12 appear that a trial there would be so unduly burdensome that  
13 fairness requires the transfer to another district." *United*  
14 *States v. Larsen*, No. 13-cr-688, 2014 WL 177411, at \*2  
15 (S.D.N.Y. Jan. 16, 2014) (quoting *United States v. United*  
16 *States Steel Corp.*, 233 F.Supp. 154, 157 (S.D.N.Y. 1964)).  
17 Additionally, "there has been a trend in recent years away from  
18 granting transfers pursuant to Rule 21(b)," which is "hardly  
19 surprising when one considers the massive expansion of  
20 technology and the relative decline in costs for long-distance  
21 travel over the past few decades." *United States v. Blondet*,  
22 No. 16-cr-387, 2019 WL 5690711, at \*2 (S.D.N.Y. Nov. 4, 2019)  
23 (quoting *United States v. Quinn*, 401 F.Supp.2d 80, 85-86  
24 (D.D.C. 2005)).

25 Let's do each of the ten factors seriatim.

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1               One: Location of defendants.

2               Although all four defendants reside in New Jersey,  
3 "the inconvenience of having to stand trial outside of one's  
4 home district, without more, is insufficient to warrant a  
5 transfer." *United States v. Coriaty*, No. 99-cr-1251, 2000 WL  
6 1099920, at \*2 (S.D.N.Y. Aug. 7, 2000). There is no reason to  
7 think that the courthouse in Foley Square is particularly  
8 inconvenient to the defendants. Indeed, Mr. and Mrs. Menendez  
9 actually reside in Englewood Cliffs -- which, according to the  
10 internet, is located 20 miles from Foley Square -- and Daibes  
11 and Hana reside in Edgewater -- which is ten miles from Foley  
12 Square. Actually, that comes from the government memorandum,  
13 not the internet. It may, in turn, be from the internet. It's  
14 ECF 180 at 149. Those distances are trivial, regardless of the  
15 fact that there may be heavy traffic into and out of New York.  
16 So this factor does not favor transfer.

17               Number Two: Location of possible witnesses.

18               Defendants -- that is, Mr. Menendez asserts that few  
19 witnesses are located here, but I actually don't know who the  
20 witnesses are going to be. The parties haven't told me. A  
21 "naked allegation that witnesses will be inconvenienced by  
22 trial here does not suffice for transfer." *United States v.*  
23 *Spy Factory, Inc.*, 951 F.Supp. 450, 456 (S.D.N.Y. 1997)  
24 (quoting *United States v. Haley*, 504 F.Supp. 1124, 1126  
25 (E.D.Pa. 1981)). It is defendants' burden to "specifically

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1 describe how particular witnesses would be entirely prevented  
2 from testifying at trial in the Southern District of New York."

3 *United States v. Blakstad*, No. 19-cr-486, 2020 WL 5992347, at  
4 \*4 (S.D.N.Y. Oct. 9, 2020). Defendants here have done no such  
5 thing. As I said, there is no mention at all of inconvenience  
6 to witnesses in their briefing, let alone of any specific  
7 instance of inconvenience to any particular witness.

8 Defendants thus have failed to meet their burden on factor  
9 number two, and this factor does not favor transfer.

10 Number Three: Location of events likely to be in  
11 issue.

12 As defendants state, indeed, a substantial portion of  
13 the events at issue here occurred in New Jersey. The  
14 government correctly states that there are also events that  
15 occurred in New York and Washington and Egypt and Qatar that  
16 are relevant. But it does appear that New Jersey is the state  
17 where many of the events likely to be at issue occurred; and,  
18 therefore, this factor favors transfer to New Jersey, but not  
19 very strongly.

20 Four: Location of documents and records likely to be  
21 involved.

22 This is of limited use to the Court because "modern  
23 developments in electronics and computers render documents  
24 readily available to a defendant wherever he is located."

25 *United States v. Avenatti*, No. 19-cr-374, 2019 WL 4640232, at

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\*4 (S.D.N.Y. Sept. 24, 2019); see also *United States v. Pastore*, No. 17-cr-343, 2018 WL 395490, at \*4 (S.D.N.Y. Jan. 11, 2018). Common sense tells us that as well. This is 2024; documents are available to the parties wherever they may be due to liberal employment of computers. This factor does not favor transfer.

Five: Disruption of defendant's business unless the action is transferred.

Trial is a substantial disruption for all the parties, including the government. But there is no discernible difference in the disruption to these defendants' businesses between having trial in Newark or having it across the river, here in Manhattan. This factor does not favor transfer.

Six: Expense to the parties.

Daibes alone, among the defendants, singles out this factor as being in his favor because it was anticipated by him that his counsel—at that time, Arleo & Donohue, located in New Jersey—would need to relocate to a hotel in New York for the duration of this trial. This not only lacks persuasive force, but on March 5, that firm withdrew, and Daibes is now represented by Cesar de Castro, P.C., which is located on Fulton Street, eight blocks away. Thus, among all counsel, only Gibbons is located in New Jersey, and that firm's website says they have 40 lawyers in their New York office. In addition, the government would almost certainly have increased

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1 costs by putting its case on in New Jersey rather than in the  
2 Southern District of New York where the Southern District U.S.  
3 Attorney's Office is located. Where the "defendant has not  
4 shown that the additional expense is unduly onerous in light of  
5 his circumstances, nor that he would be unable to bear such  
6 expenses," this factor "does not weigh in favor of transfer."  
7 *United States v. Calk*, No. 19-cr-366, 2020 WL 703391, at \*4  
8 (S.D.N.Y. Feb. 12, 2020). In addition, the parties have  
9 lawyers from D.C. and L.A. that fly into New York routinely in  
10 this case. Perhaps the lawyer from D.C. takes the train, I  
11 don't know, but there is essentially no difference between  
12 landing in Newark or landing in New York City. This factor  
13 does not favor transfer. And regardless of where Mrs.  
14 Menendez's successor counsel is going to come from, as far as I  
15 can tell, this factor does not favor transfer. And the other  
16 factors would not change as well.

17              Seven: Location of counsel.

18              Daibes says that because Hana's counsel is in New  
19 Jersey, the action should be transferred to New Jersey.  
20 However, as I have said, defense counsel are located in New  
21 York, New Jersey, D.C. and L.A., and the prosecution team's  
22 location is also relevant here. See *Stephenson*, 895 F.2d at  
23 875; *United States v. Kolfage*, No. 20-cr-412, 2020 WL 7342796,  
24 at \*5 (S.D.N.Y. Dec. 14, 2020). This factor does not favor  
25 transfer.

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1           Eight: Relative accessibility of trial.

2           In the Avenatti trial, the trial judge said "Manhattan  
3 is clearly one of the most accessible locations in the United  
4 States with three major airports and a variety of other public  
5 transportation." That's true. This factor does not favor  
6 transfer.

7           Nine: Docket condition of each district.

8           There is no evidence in this record that the  
9 defendants would receive an earlier trial in New Jersey than  
10 the May 6 trial that we are facing. This factor does not favor  
11 transfer.

12           Ten: Any other special elements which might affect  
13 the transfer.

14           Mr. Menendez contends that there is a special element  
15 here that might affect the transfer. He says transfer is  
16 warranted to protect the interests of the people of the state  
17 of New Jersey. He claims that there are weighty democratic  
18 implications of this case, as its outcome "could directly  
19 implicate whether New Jerseyans continue to be represented by  
20 the person duly and democratically chosen by them." That's  
21 from ECF 137 at 17. He also urges that a case so closely tied  
22 to the democratic interests of New Jersey voters should not be  
23 determined by a New York jury.

24           The Court has considered these points and finds that  
25 these democratic interests are relevant, insofar as the

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1 Senator's argument appears to go to whether a transfer is in  
2 the interest of justice. But this special element does not  
3 overcome the preceding nine which, on balance, on strong  
4 balance, militate against transfer.

5 The defendants had the burden on this motion to show  
6 that a trial in New York "would be so unduly burdensome that  
7 fairness requires the transfer to another district." *Larsen*,  
8 2014 WL 177411, at \*2 (quoting *United States Steel Corp.*, 233  
9 F.Supp. at 157). Defendants have not shown that holding the  
10 trial in the Southern District of New York either burdens the  
11 defense or creates undue prejudice against them. In its  
12 essence, this is simply a motion brought because the defendants  
13 live in New Jersey and would prefer to be tried there. That is  
14 not a sufficient reason to grant the motion. The motion to  
15 transfer this case to the District of New Jersey because of the  
16 convenience of witnesses and the parties and in the interest of  
17 justice is denied.

18 The next motion is by Menendez and Hana for bills of  
19 particulars.

20 Hana and Mr. Menendez request that the Court order  
21 bills of particulars pursuant to Federal Rule of Criminal  
22 Procedure 7(f), which "permits a party to seek a bill of  
23 particulars in order to identify with sufficient particularity  
24 the nature of the charge pending against him, thereby enabling  
25 defendant to prepare for trial, to prevent surprise, and to

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1 interpose a plea of double jeopardy should he be prosecuted a  
2 second time for the same offense." *United States v.*  
3 *Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987).

4 "A bill of particulars is required only where the  
5 charges of the indictment are so general that they do not  
6 advise the defendant of the specific acts of which he is  
7 accused." *United States v. Walsh*, 194 F.3d 37, 47 (2d Cir.  
8 1999) (quoting *United States v. Torres*, 901 F.2d 205, 234 (2d  
9 Cir. 1990)). "In deciding a motion for a bill of particulars,  
10 the important question is whether the information sought is  
11 necessary, not whether it is helpful." *United States v.*  
12 *Mandell*, 710 F.Supp.2d 368, 384 (S.D.N.Y. 2010).

13 This motion, as the prior motions when I stated it, is  
14 addressed to the sound discretion of the trial judge. And "if  
15 the information sought by defendant is provided in the  
16 indictment or in some acceptable alternate form, no bill of  
17 particulars is required." *Bortnovsky*, 820 F.2d at 574. "A  
18 bill of particulars is not a general investigative tool, a  
19 discovery device or a means to compel the government to  
20 disclose evidence or witnesses to be offered prior to trial."  
21 *United States v. D'Amico*, 734 F.Supp.2d 321, 335 (S.D.N.Y.  
22 2010) (citing *United States v. Gibson*, 175 F.Supp.2d 532, 537  
23 (S.D.N.Y. 2001)).

24 There are three categories of information over which a  
25 bill of particulars is sought, two of which are sought by Hana

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1 and the other by Menendez. Let's turn to Mr. Hana first.

2                 The S4 indictment charges, "In the Southern District  
3 of New York and elsewhere, Robert Menendez, Nadine Menendez,  
4 and Wael Hana, and others known and unknown" conspired to have  
5 Robert Menendez "act as an agent of a foreign principal, to  
6 wit, the government of Egypt and Egyptian officials." Hana  
7 requests that the government be required to identify with  
8 specificity the identity of the foreign principals, those with  
9 whom Hana is alleged to have conspired, and locations where the  
10 alleged crimes occurred.

11                 Hana, and every defendant, has received sufficiently  
12 detailed information—in the indictment and from substantial  
13 discovery—to put him and all the defendants on notice of the  
14 charges against them. The indictment is 66 pages long and  
15 contains 125 detailed, numbered paragraphs. In addition,  
16 substantial and extensive discovery has been provided to Hana,  
17 including search warrants and highly detailed and extensive  
18 affidavits describing evidence and the alleged schemes;  
19 documents related to the seizure of physical evidence;  
20 electronic evidence from multiple devices and accounts;  
21 evidence from pen registers; documents from individuals and  
22 entities; and witness statements. Indeed, some of the  
23 defendants have been saying there's a great deal of information  
24 that they have been given -- in fact, they say too much. The  
25 government has also provided the discovery in database

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1 load-ready format, with a detailed, searchable index and a  
2 glossary of terms used in the indictment. This is more than  
3 sufficient to enable defendants to prepare for trial and to  
4 prevent surprise regarding the charges against them.

5 In particular, regarding the foreign principals, the  
6 indictment includes detailed allegations regarding the  
7 government of Egypt and various Egyptian officials. Hana also  
8 concedes that the government provided him the names of those  
9 officials in October of 2023. (ECF 186 at n.24.) Regarding the  
10 "others known and unknown," the inclusion of additional  
11 unindicted co-conspirators is not a basis to order a bill of  
12 particulars unless the conspiracy involves "a large number of  
13 co-conspirators over a long period of time." *United States v.*  
14 *Block*, No. 16-cr-595 (JPO), 2017 WL 1608905, at \*6 (S.D.N.Y.  
15 Apr. 28, 2017). That is not the case here. The government has  
16 also provided the parties with a glossary of addresses  
17 referenced in the indictment. The request for additional  
18 information is essentially an inappropriate demand for  
19 evidentiary detail. The parties' requests amount to the  
20 "wheres, whens and with whoms" that are "beyond the scope of a  
21 bill of particulars." *Torres*, 901 F.2d at 222-23; also *United*  
22 *States v. Mitlof*, 165 F.Supp.2d 558, 569 (S.D.N.Y. 2001).

23 Hana seeks a bill of particulars setting forth "all  
24 official acts that Senator Menendez allegedly agreed to perform  
25 and all duties the Senator allegedly agreed to breach in

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connection with the conspiracies, and which alleged bribes paid or agreed to be paid by Mr. Hana correspond to which alleged matters Senator Menendez promised to influence." (ECF 223 at 34).

Hana asserts that there is a greater need for a bill of particulars when a conspiracy offense is alleged, citing *United States v. Agnello*, 367 F.Supp.444, 450 (E.D.N.Y. 1973) and *United States v. Barnes*, 158 F.3d 662, 666 (2d Cir. 1998). Even assuming arguendo there is a greater need for a bill of particulars when the government alleges a conspiracy offense, the allegations in this indictment do not trigger a need for a bill of particulars. Here, the government has put substantial meat on the bones in response to questions by the government. The indictment sets forth in detail the charges, including the acts sought and promised and the bribes provided in exchange for the acts, and details of the defendants' alleged roles in the crimes charged. The charges in the S4 indictment are not "so general that they do not advise the defendants of the specific acts of which they are accused." *Torres*, 901 F.2d at 234. Rather, the detail in the indictment adequately conveys to defendants the government's theory of the case and the proof that will be offered. The Court finds that defendants have been "furnished with sufficient detail to fairly apprise them of the transactions to be proved so that they will have a reasonable opportunity to meet the charges of performing the

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1 specific acts." *Agnello*, 367 F.Supp. at 450.

2           While this Court acknowledges the considerable amount  
3 of discovery produced by the government, the government  
4 represents that it has been responding to defendants' requests  
5 for information throughout the pendency of this case. See  
6 *United States v. Brewster*, No. 19-cr-833 (SHS), 2021 WL  
7 3423521, at \*2 (S.D.N.Y. Aug. 5, 2021). Including answering  
8 questions the defense counsel may have had regarding where to  
9 find materials in the discovery. The government is also going  
10 to provide 3500 material prior to trial.

11           Thus, Hana has not shown that a bill of particulars is  
12 necessary to enable him to prepare his defense and to avoid  
13 unfair surprise at trial. Each of the motions for a bill of  
14 particulars is denied.

15           Now, Menendez also requests a bill of particulars for  
16 the government in order to support venue here. I have already  
17 talked about that. The bill of particulars is not appropriate.  
18 The S4 indictment identifies several alleged overt acts in  
19 furtherance of the conspiracy that's alleged. The government  
20 has provided defendants with discovery in searchable form with  
21 a searchable index and a glossary. The government has met the  
22 threshold, and has exceeded it, of providing defendants with  
23 sufficient information as to the government's bases for  
24 asserting venue here. See *United States v. Murgio*, 209  
25 F.Supp.3d 698, 721 (S.D.N.Y. 2016), and *United States v.*

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1       *Griffith*, No. 20-cr-15 (PKC), 2020 WL 4369650, at \*3 (S.D.N.Y.  
2 July 20, 2020). What defendants appear to seek here really  
3 concerns the sufficiency of the evidence at trial, not the  
4 sufficiency of the allegations. Bills of particulars are to  
5 resolve the latter concern, not the former. See *United States*  
6 v. *Samsonov*, No. 07-cr-1198 (CM), 2009 WL 176721, at \*3  
7 (S.D.N.Y. Jan. 23, 2009).

8           Menendez has not shown that a bill of particulars is  
9 necessary to enable him to prepare his defense and to avoid  
10 unfair surprise at trial. His motion as to venue is denied.  
11 Therefore, the Menendez and Hana motions for bills of  
12 particulars are denied in all respects.

13           Now let's turn to severance.

14           Mr. Menendez and Mrs. Menendez have separately moved  
15 for severance of their trials, each from the other. That's  
16 been handled due to Mrs. Menendez's medical issues.

17           Menendez has also moved to sever his trial from that  
18 of Hana and Daibes. And Daibes has moved to sever his trial  
19 from the other defendants. So I will proceed to deal with  
20 those motions.

21           Rule 8(b) permits joining multiple defendants in one  
22 indictment "if they are alleged to have participated in the  
23 same act or transaction, or in the same series of acts or  
24 transactions, constituting an offense or offenses." The  
25 well-settled preference for combined trials "is particularly

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1 strong where, as here, the defendants are alleged to have  
2 participated in a common plan or scheme." *United States v.*  
3 *Salameh*, 152 F.3d 88, 115 (2d Cir. 1998). However, if the  
4 joinder "appears to prejudice a defendant," Rule 14 permits a  
5 court to "order separate trials of counts, sever the  
6 defendants' trials, or provide any other relief that justice  
7 requires."

8 "Rules 8(b) and 14 are designed to promote economy and  
9 efficiency and to avoid a multiplicity of trials, so as long as  
10 these objectives can be achieved without substantial prejudice  
11 to the right of the defendants to a fair trial." *Zafiro v.*  
12 *United States*, 506 U.S. 534, 540 (1993). Severance should be  
13 granted pursuant to Rule 14 "only if there is a serious risk  
14 that a joint trial would compromise a specific trial right of  
15 one of the defendants, or prevent the jury from making a  
16 reliable judgment about guilt or innocence." *Id.* at 539. The  
17 defendant moving must show that the prejudice from joinder "is  
18 sufficiently severe to outweigh the judicial economy that would  
19 be realized by avoiding lengthy multiple trials." *United*  
20 *States v. Page*, 657 F.3d 126, 129 (2d Cir. 2011) (quoting  
21 *United States v. Walker*, 142 F.3d 103, 110 (2d Cir. 1998)).  
22 "Less drastic measures" than severance, "such as limiting  
23 instructions, often will suffice to cure any risk of  
24 severance." *Zafiro*, 506 U.S. at 539.

25 Let's turn to the Menendez motion to sever from Hana

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1 and Daibes. I am denying that.

2 Menendez urges that his trial should be severed from  
3 Hana's because a joint trial would involve the admission of  
4 evidence relating to Hana's communications with Egyptian  
5 officials that would not be admissible if Menendez were tried  
6 alone. However, even at a separate trial, statements and  
7 actions taken in furtherance of a conspiracy by a  
8 co-conspirator—here, Hana's communications with Egyptian  
9 officials—would be admissible pursuant to Federal Rule of  
10 Evidence 801(d)(2)(E). In addition, even if certain statements  
11 were not admissible against Menendez in a separate trial, I am  
12 not persuaded that the introduction of the evidence would  
13 result in a miscarriage of justice or substantial prejudice to  
14 Menendez. See *United States v. Spinelli*, 352 F.3d 45, 54–56  
15 (2d Cir. 2003).

16 Menendez also claims that his trial should be severed  
17 from Daibes because the risk of Daibes's criminal history would  
18 improperly lead the jury to conclude that Menendez is guilty.  
19 However, Daibes's criminal history relating to his New Jersey  
20 prosecution would likely be admissible against Menendez even in  
21 a separate trial because the indictment alleges that Menendez  
22 sought to disrupt that very prosecution. In addition, Menendez  
23 has not explained why Daibes's criminal history relating to a  
24 separate prosecution would prejudice him. As the Second  
25 Circuit has explained regarding the admissibility of evidence,

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the possibility that a jury draws an adverse inference against a defendant merely "because of their association with a codefendant shown to have a prior criminal record" is "too insubstantial in most circumstances to survive forceful instructions." *United States v. Figueroa*, 618 F.2d 934, 946 (2d Cir. 1980). Here, any risk of prejudice is not substantial enough to warrant severance and, in any event, can be remedied by an appropriate jury instruction. See *Spinelli*, 352 F.3d at 55. Accordingly, Menendez has not shown substantial prejudice and the interests of judicial economy weigh more strongly in favor of a joint trial. See *Zafiro*, 506 U.S. at 540. Menendez's motion to sever his trial from that of Daibes and Hana is denied.

Now let me turn to Daibes's motion to sever his trial from the codefendants.

Daibes first argues that the claims against him do not meet the requirements for joinder under Rule 8 because they are unrelated to the allegations against Uribe and Hana. He's wrong. Rule 8(b) allows joinder of offenses and defendants where two or more persons' criminal "acts are unified by some substantial identity of facts or participants or arise out of a common plan or scheme." *United States v. Feyrer*, 333 F.3d 110, 114 (2d Cir. 2003); see also *United States v. Attanasio*, 870 F.2d 809, 815 (2d Cir. 1989); and *United States v. Nerlinger*, 862 F.2d 967, 973 (2d Cir. 1988) ("The established rule is that

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1 a nonfrivolous conspiracy charge is sufficient to support  
2 joinder of defendants under Fed.R.Crim.P. 8(b).") I am sorry.  
3 That is the established rule.

4 Here, joinder is proper because the indictment alleges  
5 that the defendants, including Daibes, worked together to  
6 achieve common objectives, including Hana's actions to benefit  
7 the government of Egypt. (See S4, paragraph 16, 22, 31-36, and  
8 38.) The indictment plainly sets forth a substantial overlap  
9 of both participants and acts alleged in furtherance of a  
10 common scheme or plan.

11 Daibes also claims that severance pursuant to Rule 14  
12 is warranted because each of the following issues creates a  
13 substantial risk of prejudice: (a) Daibes is not alleged to  
14 have engaged in certain activities that are alleged against the  
15 other defendants; (b) certain conduct alleged against Daibes is  
16 too similar to unrelated conduct alleged against Uribe; and (c)  
17 Daibes's similar ethnic background to that of the other  
18 defendants. These reasons I find do not meet the  
19 substantiality requirement for severance and any potential  
20 prejudice is adequately remedied by jury instructions. See  
21 *Spinelli*, 352 F.3d at 55; *United States v. Ramos*, 346 F.Supp.2d  
22 567, 575 (S.D.N.Y. 2004) (quoting *United States v. Santiago*,  
23 174 F.Supp.2d 16, 22 (S.D.N.Y. 2001)).

24 The Court has no reason to believe that a properly  
25 instructed jury would not be able to distinguish between

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1 Daibes's conduct and the conduct of other defendants, even  
2 those of a similar ethnic background. Accordingly, Daibes has  
3 not shown substantial prejudice and the interests of judicial  
4 economy weigh strongly in favor of a joint trial. As I said  
5 earlier, I would be able to try all of the defendants at one  
6 time, but I am unable to do so given Mrs. Menendez's medical  
7 concerns and the uncertainty of when she would be able to stand  
8 trial. Daibes's motion to sever his trial from the other  
9 defendants is denied.

10 This is Hana's motion to dismiss Count Fifteen, which  
11 is the conspiracy for Menendez to act as a foreign agent, and  
12 to strike paragraph 15 as surplusage. I have already handled  
13 Mr. Hana's motion for a bill of particulars.

14 Hana has moved to dismiss the charge of conspiracy for  
15 Robert Menendez to act as a foreign agent, Count Fifteen, and  
16 to strike paragraph 15.

17 18 U.S.C., Section 219 prohibits a public official  
18 from acting as an agent of a foreign principal who is required  
19 to register under the Foreign Agents Registration Act.  
20 Pursuant to Section 219(a), "Whoever, being a public official,  
21 is or acts as an agent of a foreign principal required to  
22 register under the Foreign Agents Registration Act of 1938  
23 shall be fined under this title or imprisoned for not more than  
24 two years or both."

25 Count Fifteen alleges a conspiracy among Menendez,

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1 Mrs. Menendez, and Hana for Menendez to act as a foreign  
2 principal in violation of Section 219.

3 It should be clear to everybody that when I say  
4 Menendez, I am referring to Mr. Menendez; and when I am  
5 referring to Mrs. Menendez, I will refer to her as Mrs.  
6 Menendez or Nadine Menendez.

7 Hana has moved to dismiss this count on three grounds:  
8 (1) individuals who are not public officials may not be charged  
9 with conspiracy to violate Section 219 because of the  
10 affirmative legislative policy exception; (2) the indictment  
11 fails to properly charge a conspiracy to violate 219; and (3)  
12 Section 219 is unconstitutionally vague as applied to the facts  
13 here. In addition, Hana moves for paragraph 15 of the  
14 indictment to be stricken as surplusage. Those requests are  
15 denied.

16 Let's turn first to the affirmative legislative policy  
17 exception. That exception does not apply.

18 Hana first urges that Section 219 does not permit  
19 conspiracy liability for individuals who are not public  
20 officials. While the general rule for conspiracy is that "a  
21 person may be liable for conspiracy even though he was  
22 incapable of committing the substantive offense," the so-called  
23 affirmative legislative policy exception applies where  
24 "Congress demonstrates an affirmative legislative policy to  
25 leave some type of participant in a criminal transaction

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1 unpunished." *United States v. Hoskins*, 902 F.3d 69, 77 (2d  
2 Cir. 2018).

3 This policy exception is "narrowly circumscribed."  
4 *Id.* As the Second Circuit outlined, "We cannot identify such a  
5 policy whenever a statute focuses on certain categories of  
6 persons at the exclusion of others." *Id.* at 80. This is a  
7 case for Section 219's limited applicability to public  
8 officials. There must be "something more" in the "statute's  
9 text, structure, or legislative history" to suggest that the  
10 "lawmaker must have intended that accomplice liability not  
11 extend to certain purposes."

12 Hana cites no case where the affirmative legislative  
13 policy exception was previously applied to Section 219, and his  
14 argument that I should apply it here for the first time is not  
15 persuasive. As in *Hoskins*, the mere fact that Section 219  
16 applies only to public officials is not sufficient to support a  
17 policy exception for conspiracy liability. And Hana has failed  
18 to present "something more" to demonstrate congressional intent  
19 creating a policy exception. He has presented "no established  
20 principle of law or legislative history," and his arguments  
21 regarding the text and structure of the statute are not  
22 persuasive. Hana has simply not demonstrated that the  
23 affirmative legislative policy exception applies to Section  
24 219.

25 Hana also argues that the Court should dismiss Count

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1 Fifteen because it fails to set out the elements of a  
2 conspiracy to violate Section 219. I do not agree with  
3 Mr. Hana's contention, and I am going to deny this motion.

4 Rule 7(c)(1) states that an indictment must "be a  
5 plain, concise, and definite written statement of the essential  
6 facts constituting the offense charged" and include the  
7 "statute, rule, regulation, or other provision of law that the  
8 defendant is alleged to have violated." "An indictment need do  
9 little more than to track the language of the statute charged  
10 and state the time and place (in approximate terms) of the  
11 alleged crime." *United States v. Alfonso*, 143 F.3d 722, 776  
12 (2d Cir. 1998). An indictment is impermissibly defective if it  
13 fails to "set out all of the essential elements of the offense  
14 charged." *United States v. Gonzalez*, 686 F.3 122, 127 (2d Cir.  
15 2012).

16 The S4 indictment manifestly meets this standard.  
17 Hana is charged with conspiracy to violate Section 219, which  
18 prohibits a public official from acting as an agent of a  
19 foreign principal who would be required to register under FARA.  
20 FARA, in turn, requires registration by individuals engaging  
21 in, for example, "political activities" "at the order, request,  
22 or under the direction or control" of a "foreign government."  
23 22 U.S.C., Section 611-612. For conspiracy counts, an  
24 indictment needs to charge an agreement to commit an offense,  
25 defendant's knowing participation in the conspiracy with intent

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1 to commit the offense, and an overt act in furtherance of the  
2 conspiracy. See *United States v. Martin*, 411 F.Supp.2d 370,  
3 372 (S.D.N.Y. 2006).

4 The indictment sufficiently alleges the essential  
5 elements of such a violation. In Count Fifteen, the indictment  
6 alleges that Menendez, Nadine, and Hana willfully and knowingly  
7 agreed to have Menendez act as an agent of the government of  
8 Egypt and Egyptian officials. Other paragraphs of the  
9 indictment allege that Menendez is a public official; that  
10 Egyptian officials requested that Menendez exercise his  
11 authority to grant U.S. military aid to Egypt; that through  
12 Nadine and Hana, Menendez conveyed to the Egyptian officials  
13 that he planned to approve military aid; that Menendez provided  
14 sensitive nonpublic information to the Egyptian government; and  
15 that Menendez ghost-wrote a letter on behalf of Egypt to  
16 convince other senators to lift a hold on Egyptian aid. Count  
17 Fifteen also alleges two overt acts supporting the conspiracy  
18 charge, one of which is a meeting between Menendez, Hana, and  
19 an Egyptian official. In addition, Hana allegedly arranged and  
20 paid for meetings and dinners between Menendez and the Egyptian  
21 officials where the officials requested military aid; promised  
22 to pay Nadine for a low-or-no-show job; relayed the message  
23 about aid, the ghost-written letter, and other nonpublic  
24 information from Menendez to the foreign officials; and  
25 communicated with an Egyptian official who requested that

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1 Menendez resolve a human rights matter.

2 Detailed factual allegations supporting each element  
3 of the offense are present and are sufficient to support a  
4 conspiracy to violate Section 219 for the purposes of Rule  
5 (c). Hana's motion to dismiss Count Fifteen for failure to  
6 allege a Section 219 conspiracy is denied.

7 Let's now turn to Mr. Hana's third argument for  
8 dismissing Section 219. He claims it is unconstitutionally  
9 vague as applied to the facts alleged here and, once again, I  
10 disagree with his argument.

11 In order to survive a void-for-vagueness attack on a  
12 statute, a penal statute must define the criminal offense "with  
13 sufficient definiteness that ordinary people can understand  
14 what conduct is prohibited and in a manner that does not  
15 encourage arbitrary and discriminatory enforcement." *United  
16 States v. Dawkins*, 999 F.3d 767, 787 (2d Cir. 2021) (quoting  
17 *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d  
18 242, 265 (2d Cir. 2015)).

19 Hana claims that Section 219 is hopelessly muddled  
20 because the statute criminalizes behavior that's defined in  
21 another statute, that is, FARA; and, according to his reading  
22 of Section 219, it prohibits conduct by a nonexistent category  
23 of people, that is, a foreign principal required to register  
24 under FARA. I find that argument particularly ingenious.

25 Hana's vagueness challenge is meritless.

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1                 First, a statute is not unconstitutionally vague  
2 simply because it references another statute. *See United*  
3 *States v. Stokes*, 726 F.3d 880, 896 (7th Cir. 2013), *cert.*  
4 *denied*, 571 U.S. 1084 (2013). Section 219 is quite clear about  
5 what it proscribes: public officials are prohibited from  
6 engaging in activities that would require them to register  
7 under FARA as a foreign agent. In addition, Hana's reading of  
8 the statutory language—that it applies to an agent of a  
9 foreign principal who is required to register—is illogical.  
10 The more logical interpretation by far is that the statute  
11 applies to an "agent of a foreign principal" who is "required  
12 to register." It is the agent who is required to register, not  
13 the foreign principal. It seems to me that is manifest.

14                 This ruling is bolstered by the statute's obvious  
15 purpose in prohibiting public officials from acting as foreign  
16 agents and by FARA's consistent use of the phrase "agent of a  
17 foreign principal." *See* 22 U.S.C., Section 611(c), 613, 615.  
18 Finally, it is apparent from Hana's other arguments, including  
19 his argument that the indictment fails to properly charge a  
20 conspiracy to violate Section 219, that Hana clearly  
21 understands the statute's applicability. (*See* ECF 223 at  
22 47–54.)

23                 Hana's claim that Section 219 is unconstitutionally  
24 vague is denied.

25                 Now let's turn to his effort to strike paragraph 15,

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which alleges that he never registered as a foreign agent or a lobbyist covered by FARA. Hana claims that this allegation is surplusage, inflammatory, and prejudicial because the government has not charged Hana with any substantive violation of FARA and it should be stricken pursuant to Fed.R.Crim.P 7(d).

"Motions to strike surplusage from an indictment will be granted only where the challenged allegations are not relevant to the crime charged and are inflammatory or prejudicial." *United States v. Scarpa*, 913 F.2d 993, 1013 (2d Cir. 1990). Such motions are rarely granted. See *United States v. Murgio*, 209 F.Supp.3d 698, 724 (S.D.N.Y. 2016). Indictments may permissibly describe conduct that is relevant to the charges or provides relevant background information. *United States v. Mostafa*, 209 F.Supp.3d 698, 724 (S.D.N.Y. 2016) (citing *United States v. Mulder*, 273 F.3d 91, 100 (2d Cir. 2001)). As long as the "evidence of the allegation is admissible and relevant to the charge, then regardless of how prejudicial the language is, it may not be stricken." *Scarpa*, 913 F.2d at 1013.

Here, the Court finds the allegation that Hana has failed to register as a foreign agent or lobbyist is indeed relevant to Hana's belief in the wrongfulness of his alleged conduct—conspiring to violate Section 219—and that of his alleged co-conspirators. I am not striking paragraph 15.

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I wish to move on to defendants' motions to dismiss Counts One, Two, Three, Six, Seven, Nine, Twelve and Thirteen for failure to state an offense -- that is, they claim there is no allegation of an official act pursuant to *McDonnell*, and no allegation of a *quid pro quo*.

Defendants urge that several of the bribery counts in the S4 indictment -- One, Two, Three, Six, Seven, Nine, Twelve and Thirteen -- must be dismissed for failure to charge an offense pursuant to Rule(b)(3)(B)(v) of the Federal Rules of Criminal Procedure.

Rule 7(c)(1) requires that "the indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged" and that "for each offense, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated." Fed.R.Crim.P. 7(c)(1). "The Second Circuit has expanded on the statutory guidance, noting that an indictment is sufficient when it charges a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events." *United States v. Gonzalez*, No. 21-cr-288 (VM), 2022 WL 3684796, at \*2 (S.D.N.Y. Aug. 24, 2022) (quoting *United States v. Vilar*, 729 F.3d 62, 80 (2d Cir. 2013)).

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1                 "In evaluating a motion to dismiss, the Court accepts  
2 as true all of the allegations in the indictment." *United*  
3 *States v. Pham*, No. 12-cr-423 (AJN), 2022 WL 993119, at \*1  
4 (S.D.N.Y. Apr. 1, 2022) (quoting *United States v. Goldberg*, 756  
5 F.2d 949, 950 (2d Cir. 1985)). A defendant "faces a high  
6 standard in seeking to dismiss an indictment." *Pham*, 2022 WL  
7 993119, at \*3 (quoting *United States v. Post*, 950 F.Supp.2d  
8 510, 527 (S.D.N.Y. 2013)). "The dismissal of an indictment is  
9 an extraordinary remedy reserved only for extremely limited  
10 circumstances implicating fundamental rights." *United States v.*  
11 *Benjamin*, 95 F.4th 60, 66 (2d Cir. 2024) (quoting *United States*  
12 *v. De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001)). While the  
13 Sixth Amendment provides that "in all criminal prosecutions,  
14 the accused shall enjoy the right to be informed of the nature  
15 and cause of the accusation," an indictment "need do little  
16 more than to track the language of the statute charged and  
17 state the time and place (in approximate terms) of the alleged  
18 crime" in order to meet this constitutional requirement.  
19 *United States v. Tramunti*, 513 F.2d 1087, 1113 (2d Cir. 1975).

20                 The Court finds that the government has cleared this  
21 constitutional bar. Each count charged by the government  
22 "tracks the language of the statute charged and states the time  
23 and place (in approximate terms) of the alleged crime."  
24 *Tramunti*, 513 F.2d at 1113. The S4 indictment is suffused with  
25 facts sufficiently precise "to inform the defendants of the

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1 charges they must meet and with enough detail that they may  
2 plead double jeopardy in a future prosecution based on the same  
3 set of events." *Gonzalez*, 2022 WL 3684796, at \*2 (quoting  
4 *Vilar*, 729 F.3d at 80).

5 Defendants contend that various of the actions alleged  
6 by the government in support of its bribery-related counts are  
7 not official acts as that term is defined in *McDonnell v.*  
8 *United States*, 579 U.S. 550 (2016). However, this issue may  
9 not be decided by the Court now, but is more properly  
10 determined by the jury at the end of the case. "It is up to  
11 the jury, under the facts of the case, to determine whether the  
12 public official agreed to perform an official act at the time  
13 of the alleged *quid pro quo*." *McDonnell*, 579 U.S. at 572-73.

14 Defendants also contend that the government in its  
15 indictment failed to identify any official duty that Menendez  
16 breached. Similarly, I need not weigh in on this matter. It's  
17 moot. The government, in its omnibus opposition, has stated,  
18 at least at present, it does not intend to convict the  
19 defendants under Section 201 on the basis of a breach of a  
20 defendant's official duty. (See ECF 180 at 71.)

21 Defendants urge that the S4 indictment does not allege  
22 the required *quid pro quo*. But this is not so. The S4  
23 indictment sufficiently charges explicit *quid pro quos* under  
24 the standard recently articulated in *United States v. Benjamin*,  
25 95 F.4th at 73-74. In *Benjamin*, the Second Circuit expressed

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1 its "agreement with the government that the phrase 'in exchange  
2 for' satisfied the *quid pro quo* requirement of *McCormick*  
3 because it alleged an unambiguous agreement to exchange an  
4 official public act by Benjamin for financial contributions  
5 from Migdol." *Id.* at 74. The Second Circuit went on to state,  
6 moreover, "the fact that the agreement was never stated  
7 expressly is immaterial because the existence of the agreement,  
8 and the clarity of its terms to Migdol and Benjamin, could be  
9 inferred from their words and actions." *Id.*

10 In the case before this Court, each of the substantive  
11 counts in S4 challenged by the defendants consists of the same  
12 "in exchange for" language that was sufficient in *Benjamin* and  
13 alleges the provision of specific things of value provided by  
14 Daibes and Hana for specific alleged official acts to be  
15 performed by Menendez. The facts alleged by the government are  
16 sufficient to allow the jury to infer the existence of an  
17 agreement between defendants. It is of no consequence that the  
18 government alleges several items of value in exchange for  
19 several acts; the Second Circuit has recognized that a bribery  
20 scheme can involve such structures as "this for these or these  
21 for these, not just this for that." *United States v. Silver*,  
22 948 F.3d 538, 554 (2d Cir. 2020) (quoting *United States v.*  
23 *Ganim*, 510 F.3d 134, 148 (2d Cir. 2007)).

24 To the extent that defendants assert that the  
25 government must allege that a public official must have

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1 actually taken an act in order to successfully state a bribery  
2 offense, this is simply not so. See *Evans v. United States*,  
3 504 U.S. 255, 268 (1992). The offense is completed at the time  
4 that the public official receives a payment in return for his  
5 agreement to perform specific official acts; fulfillment of the  
6 *quid pro quo* is not an element of the offense. Indeed, the  
7 public official need not have even "in fact intended to perform  
8 the official act so long as he agrees to do so." *McDonnell*,  
9 579 U.S. at 572.

10 Defendants raise the point that "the relevant time  
11 period in a *quid pro quo* bribery scheme is the moment at which  
12 the public official accepts the payment or agrees to accept  
13 it." (ECF 130 at 6 (quoting *Silver*, 948 F.3d at 556)). They  
14 note that the S4 indictment fails "because it does not allege  
15 that at the time an alleged payment was accepted, or a promise  
16 was made, it was in order to influence a particular matter or  
17 question." (ECF 186 at 16.)

18 However, the government has sufficiently alleged an  
19 agreement "to influence a focused, concrete, and particular  
20 question or matter." (ECF 180 at 72-73.) The case that  
21 defendants cite to support their proposition is *United States*  
22 v. *Silver*, 948 F.3d 538 (2d Cir. 2020). *Silver* does state that  
23 "the government must prove that, at the time the bribe was  
24 accepted, the defendant promised to take official action on a  
25 specific and focused question or matter as the opportunities to

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1 take such action arose." *Silver*, 948 F.3d at 568. But like  
2 *McDonnell*, *Silver* was a case concerning jury instructions, not  
3 the sufficiency of an indictment. The jury here will determine  
4 whether the government has met the standard articulated in  
5 *Silver*.

6 Defendants' motions to dismiss Counts One, Two, Three,  
7 Six, Seven, Nine, Twelve and Thirteen are denied. They all  
8 have been adequately alleged by the government.

9 I now want to turn to defendants' motions to dismiss  
10 the indictment on the basis of duplicity. They contend that  
11 Counts One, Two, Three, Six, Seven, Twelve, Thirteen and  
12 Fifteen are impermissibly duplicitous pursuant to Federal Rule  
13 of Criminal Procedure 8(a).

14 "An indictment is impermissibly duplicitous where: (1)  
15 it combines two or more distinct crimes into one count in  
16 contravention of Federal Rule of Criminal Procedure 8(a)'s  
17 requirement that there be a separate count for each offense;  
18 and (2) the defendant is prejudiced thereby." *United States v.*  
19 *Sturdivant*, 244 F.3d 71, 75 (2d Cir. 2001) (quoting *United*  
20 *States v. Murray*, 618 F.2d 892, 896 (2d Cir. 1980)).

21 Policy considerations underlying the prejudice  
22 analysis "include avoiding the uncertainty of whether a general  
23 verdict of guilty conceals a finding of guilty as to one crime  
24 and a finding of not guilty as to another, avoiding the risk  
25 that the jurors may not have been unanimous as to any one of

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1 the crimes charged, assuring the defendant adequate notice,  
2 providing the basis for appropriate sentencing, and protecting  
3 against double jeopardy in a subsequent prosecution." *United*  
4 *States v. Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981).

5 The Second Circuit has found that distinct crimes are  
6 not combined into a single count in contravention of Rule  
7 8(a) -- which is to say, the Second Circuit has not found  
8 impermissible duplicity -- when "acts that could be charged as  
9 separate counts of an indictment are instead charged in a  
10 single count if those acts can be characterized as part of a  
11 continuing single scheme." *United States v. Tutino*, 883 F.2d  
12 1125, 1141 (2d Cir. 1989).

13 When it comes to charging a conspiracy "it is well  
14 established that the allegation in a single count of a  
15 conspiracy to commit several crimes is not duplicitous, for the  
16 conspiracy is the crime and that is one, however diverse its  
17 objects." *United States v. Aracri*, 968 F.2d 1512, 1518 (2d  
18 Cir. 1992) (quoting *Murray*, 618 F.2d at 896). If "the  
19 indictment on its face sufficiently alleges a single  
20 conspiracy, the question of whether a single conspiracy or  
21 multiple conspiracies exists is a question of fact for the  
22 jury." *United States v. Rajaratnam*, 736 F.Supp.2d 683, 688  
23 (S.D.N.Y. 2010) (RJH). This is so even if the count is  
24 structured as merely a boilerplate allegation of a single  
25 conspiracy. See *United States v. Gabriel*, 920 F.Supp. 498,

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1 504-05 (S.D.N.Y. 1996) (JSR) (noting that "the Court of Appeals  
2 has repeatedly cautioned that the determination of whether a  
3 conspiracy is single or multiple is an issue of fact singularly  
4 well suited to determination by a jury.")

5 Four of the eight counts challenged by the defendants  
6 on duplicity grounds are conspiracy counts: Counts one, Two,  
7 Three, and Fifteen. Each of these counts clearly alleges a  
8 single conspiracy. For this reason alone, defendants'  
9 duplicity contention fails as to Counts One, Two, Three, and  
10 Fifteen.

11 Defendants urge that to prove a single conspiracy in a  
12 hub-and-spoke situation, where the charged defendants are the  
13 spokes, "the government must show that there was a 'rim' around  
14 the spokes, such that the 'spokes' became co-conspirators with  
15 each other." *United States v. Ulbricht*, 31 F.Supp.3d 540, 554  
16 (S.D.N.Y. 2014). This is true, but it does not lead to  
17 dismissal of the charges on the basis of duplicity. Proving  
18 the existence of the "rim" is a burden for the government at  
19 trial, not at the pleading stage. None of the cases cited by  
20 defendants on this topic even mention duplicity in this  
21 context. And while the procedural posture of one case,  
22 *Ulbricht*, is indeed at the motion to dismiss an indictment  
23 stage, the court in *Ulbricht*, 31 F.Supp.3d 540 (S.D.N.Y. 2014),  
24 takes pains to explicitly cabin the applicability of its  
25 discussion on the law of hub-and-spoke conspiracies by writing

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1 "most conspiracy questions as to size and number are left to  
2 trial. Here, the Court addresses these issues only insofar as  
3 they inform whether and how the government might ultimately  
4 prove the conspiracies alleged in the indictment." *Ulbricht*, 31  
5 F.Supp.3d at 552.

6 Defendants also contend that the common goal alleged  
7 by the government is too broad to support a single conspiracy.  
8 In one case cited by the defendants, a court in this district  
9 noted that the goal of evading taxes was unreasonably broad.  
10 *United States v. Killeen*, 1998 WL 760237, at \*3 (S.D.N.Y. Oct.  
11 29, 1998). However, the allegations in the S4 indictment  
12 depict the common purpose in a far narrower sense than as  
13 merely a general design to evade taxes. The indictment's  
14 allegations detail a scheme to utilize a senator's power and  
15 influence to assist foreign nations and, in turn, enrich that  
16 senator's codefendants. The only other case in this district  
17 that defendants cite to support their point that the counts are  
18 impermissibly broad contradicts their assertion. While the  
19 court in the *Gabriel* decision I referred to above does dismiss  
20 a count of that indictment, the reason the court did so is  
21 explicitly not because the alleged single conspiracy charge was  
22 overbroad and conclusory—and indeed, explicitly not on the  
23 grounds of duplicity—but, rather, because the count was  
24 time-barred. See *Gabriel*, 920 F.Supp. at 503–06.

25 Finally, defendants contend that the S4 indictment's

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1 substantive counts reveal that the conspiracy counts are  
2 duplicitous and must be decoupled. This is plainly not so. It  
3 is perfectly appropriate for an indictment to charge multiple  
4 substantive counts that stem from the activity alleged in a  
5 single conspiracy count. See *United States v. Percoco*, No.  
6 16-cr-776, 2017 WL 6314146, at \*12 (S.D.N.Y. Dec. 11, 2017)  
7 (stating that "the fact that this conspiracy led to multiple  
8 separate wire fraud charges is irrelevant to assessing whether  
9 the conspiracy count is duplicitous"). In other words, it is  
10 not inconsistent and duplicitous for a single conspiracy count  
11 to coexist with multiple substantive counts that relate back to  
12 the single overarching scheme alleged in the single conspiracy  
13 count. See *United States v. Rigas*, 281 F.Supp.2d 660, 665  
14 (S.D.N.Y. 2003).

15 Defendants also seek dismissal of four other counts as  
16 duplicitous -- Counts Six, Seven, Twelve, and Thirteen.  
17 However, for the reasons stated above, none of these counts can  
18 be dismissed as duplicitous. Impermissible duplicity does not  
19 exist when acts that could be charged separately are instead  
20 charged in a single count where those acts "could be  
21 characterized as part of a single continuing scheme." *Tutino*,  
22 883 F.2d at 1141.

23 I find that each of these counts as alleged by the  
24 government can be characterized that way—as part of a single  
25 continuing scheme. Even assuming that two distinct crimes are

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impermissibly combined in any of these four counts, the Court finds that defendants would not be "prejudiced thereby." The allegations in S4 are sufficiently detailed to "assure the defendant adequate notice" and "to protect against double jeopardy in a subsequent prosecution." *Margiotta*, 646 F.2d at 733. And jury instructions given at trial can ensure that "the uncertainty of whether a general verdict of guilty conceals a finding of guilty as to one crime and a finding of not guilty as to another" and "the risk that the jurors may not have been unanimous as to any one of the crimes charged" are avoided, while also "providing the basis for appropriate sentencing." *Margiotta*, 646 F.2d at 733.

Counts Six, Seven, Twelve, and Thirteen of the S4 indictment are not impermissibly duplicitous. I deny defendants' motions to dismiss S4 for impermissible duplicity pursuant to Rule 8(a). None of the counts challenged by defendants are impermissibly duplicitous.

The last motion I wish to turn to is multiplicity.

Defendant Hana moves to dismiss the conspiracy counts on multiplicity grounds.

"An indictment is multiplicitous when it charges a single offense as an offense multiple times, in separate counts, when, in law and fact, only one crime has been committed." *United States v. Chacko*, 169 F.3d 140, 145 (2d Cir. 1999). "The multiplicity doctrine is based upon the

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double jeopardy clause of the Fifth Amendment, which assures that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *United States v. Nakashian*, 820 F.2d 549, 552 (2d Cir. 1987). "The double jeopardy clause does not protect against simultaneous prosecutions for the same offense, as long as no more than one punishment is eventually imposed." *United States v. Josephberg*, 459 F.3d 350, 355 (2d Cir. 2006).

It is well established in the Second Circuit that courts defer ruling on multiplicity challenges until after the conclusion of trial. In *United States v. Josephberg*, 459 F.3d at 355, the trial court's dismissal of a count as multiplicitous prior to trial was vacated as premature. See *United States v. Constanzo*, No. 22-cr-281, 2023 WL 8451868, at \*5 (S.D.N.Y. Dec. 6, 2023). "It is a regular practice of courts in the Second Circuit to deny pretrial motions to dismiss potentially duplicitous or multiplicitous counts, reserving decision until after the jury has rendered a verdict." *United States v. Medina*, 2014 U.S. Dist. LEXIS 91751, at \*8 (S.D.N.Y. July 3, 2014) ("Since *Josephberg*, courts in this circuit have routinely denied pretrial motions to dismiss potentially multiplicitous counts as premature.")

Following this well-established precedent, I deny Hana's motion to dismiss the conspiracy counts on multiplicity grounds. Whether any count is multiplicitous depends on what

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1 the jury does. In any event, the issue arises, if at all, only  
2 after a verdict has been reached and is an issue relative to  
3 sentencing.

4 Those are my decisions on all of the pending motions.  
5 We have a trial date of May 6. I intend to hold to it. The  
6 parties are urged to continue talking to each other. You have  
7 a number of issues that you have to talk to each other about --  
8 juries, stipulations Mr. Lustberg referred to; you have some  
9 CIPA issues to try to work out. So I urge you to talk to each  
10 other.

11 I want to thank our reporter. I have been going for  
12 two hours straight. The reporters are stretched. There are a  
13 number of trials on. Ordinarily, we would switch off on the  
14 reporters. But thank you.

15 I have found in my experience, after four or more  
16 weeks of trial, the lawyers are staring into the middle  
17 distance at me with exhaustion, and I am starting to get that  
18 same gaze from the lawyers here. I am sorry I could not read  
19 it more theatrically.

20 Court is adjourned. Thank you.

21 MR. RICHENTHAL: Your Honor, one ministerial matter.

22 As to Ms. Menendez, we would ask that time be excluded  
23 under the Speedy Trial Act either to the conference date, which  
24 I believe your Honor set in June, or, frankly, I think under  
25 the circumstances and more appropriately, all the way to the

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1 control date of July 8.

2 THE COURT: Sir.

3 MR. SCHERTLER: No objection.

4 THE COURT: Any objection to that, sir.

5 MR. FEE: No, your Honor.

6 MR. LUSTBERG: No, your Honor.

7 MR. DE CASTRO: No, your Honor.

8 THE COURT: I hereby exclude time from calculation  
9 under the Speedy Trial Act from today until July 8. It's on  
10 motion of the government, with the consent of all of the  
11 defendants. I find this continuance serves to ensure the  
12 effective assistance of counsel and to prevent any miscarriage  
13 of justice. I make the finding that the ends of justice served  
14 by this continuance outweigh the best interests of the public  
15 and the defendants in a speedy trial. This is an (h) (7) (A)  
16 interest of justice exclusion, occasioned by the need to sever  
17 Mrs. Menendez.

18 Yes, sir.

19 MR. FEE: Trial schedule, if the Court has a plan  
20 about how long it's going to sit, how many days off. I didn't  
21 know if, given the length, the Court had any plans.

22 THE COURT: We have a final pretrial conference  
23 scheduled. So we will handle that at that time, or even  
24 earlier. Some of these things the parties can talk about. My  
25 schedule you can't.

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I normally tend to go 9:30 to 5, with leeway on 5. In other words, if need be, and if there are no child-care issues with the jury or things of that nature, and a witness is about to conclude, I may go a little after 5. But, similarly, if the witness ends at 4:30 and the next witness will be a lengthy one, the jury will leave earlier. I try to be flexible. But 9:30 to 4:30 or 5. That's the trial day.

Yes, Monday to Friday. If it becomes very long, we may make it four days a week, but I really intend to do five days a week.

What is the current estimate, now that we know Mrs. Menendez is not going to be in the trial, of the length of the trial?

MR. RICHENTHAL: I think our case-in-chief is probably four weeks, but obviously it may take time to pick a jury; the defense has indicated multiple times it's likely to have a case. So between those two things, I would estimate four to six weeks from start to end.

THE COURT: Is there anyone who wants to differ with that?

All right. So we will assume it's four to six weeks.

I think we have about 150 people coming in. I am not inclined to use a questionnaire, but I am looking at the questions the parties have submitted.

One of the things the parties should talk to each

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1 other about is obviously trying to agree on as many as of the  
2 charges as you can. I will expect at some point a list of  
3 witnesses and a list of relevant places.

4 How many alternates are the parties suggesting? I  
5 think, from my standpoint, four or five.

6 MR. RICHENTHAL: I think at least that.

7 Let me also note, when I said four to six weeks,  
8 that's assuming we get every stipulation we have requested.  
9 The trial is going to be substantially longer without that.  
10 Hope springs eternal and hopefully we will get them.

11 I don't just mean lawyers' stipulations. I mean  
12 authenticity, custodians.

13 THE COURT: Unless there are real issues, I don't want  
14 to have the jury deal with, or me deal with authenticity.

15 MR. RICHENTHAL: We don't either, your Honor.

16 THE COURT: Authenticity. What was the other one?

17 MR. RICHENTHAL: Authenticity, business records. We  
18 couldn't agree more. It's not yet firmly decided.

19 THE COURT: It's up to the parties to stipulate. It  
20 just seems to me, unless there is something unusual, the  
21 parties ought to be able to stipulate to authenticity and  
22 business records, custodians, chain of custody. Let's try not  
23 to waste time on that.

24 MR. RICHENTHAL: I agree.

25 THE COURT: The trial is going to go more smoothly for

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1 everybody, including the government, the defendants, the jury  
2 and the Court, if those matters can be dealt with. To have  
3 fights over that sort of thing, when we are asking citizens to  
4 sit here for four to six weeks in early summer, it shouldn't  
5 be.

6 I assume you wanted to second that comment.

7 MR. RICHENTHAL: I wanted to second it. And I wanted  
8 to say, as to the alternates, given that it's something of a  
9 moving target, given that it's lengthy, and given that we are  
10 talking about a trial that is going to go into either literally  
11 the summer, or at least what people perceive to be the summer,  
12 it may be wise to have as many as six alternates. But I don't  
13 know if the defense has a different view.

14 THE COURT: I assume the defendants feel the same way  
15 as the government has indicated, and the Court has indicated,  
16 in regard to whether or not the parties should be able to  
17 arrive at stipulations regarding authenticity, business  
18 records, chain of custody, etc.

19 MR. FEE: We agree, your Honor.

20 THE COURT: And you speak for all of the defendants.

21 MR. FEE: All my brothers and sisters. We haven't  
22 seen stips yet from the government, but in concept, of course.

23 THE COURT: Then let's get stips to them.

24 MR. RICHENTHAL: That, too, is unfortunately a not  
25 entirely accurate statement. We will work with the parties.

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1                   THE COURT: It's kumbaya time. Let's not go the other  
2 way.

3                   MR. FEE: I think at least five alternates, your  
4 Honor. I don't know if other folks have different views.

5                   THE COURT: Let me think about that. I will let you  
6 know beforehand because your number of peremps will depend upon  
7 the number of alternates.

8                   I started to look at the proposed questions to the  
9 jury. Are there going to be witnesses here who are going to be  
10 testifying in foreign languages, and if so, what? There was a  
11 reference in the proposals to Spanish and Arabic.

12                  MR. RICHENTHAL: Two things. As to witnesses, I don't  
13 anticipate someone testifying in a language other than Arabic.  
14 As to --

15                  THE COURT: Except for English.

16                  MR. RICHENTHAL: Yes. As to documents -- or Spanish,  
17 although I think Spanish is potentially less likely.

18                  Witnesses: Arabic, definitely, possibly also Spanish.  
19 And I think, at a minimum, we would want a standby interpreter  
20 in case a witness decides to switch from English to Spanish, in  
21 other words, if a witness has trouble understanding a question  
22 or something of that nature.

23                  THE COURT: I take it it's the court that supplies the  
24 interpreters; is that right?

25                  My deputy tells me the interpreters are supplied by

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1 the government if it is a government witness.

2 MR. RICHENTHAL: We will do that.

3 As to documents, we anticipate having documents that  
4 are translated both from Arabic into English and Spanish into  
5 English.

6 THE COURT: So I will then question the jurors to make  
7 sure that they are going to follow the English and not Arabic  
8 or Spanish, if they happen to know Arabic or Spanish.

9 MR. RICHENTHAL: And it's a particular fine point with  
10 respect to recordings. The jurors obviously need to follow the  
11 official translations, not any interpretation that they may  
12 have.

13 THE COURT: I take it the government is not going to  
14 play a recording in Arabic, but the jury will have the  
15 translation of it.

16 MR. RICHENTHAL: That's correct. But if a witness,  
17 for example, were to listen to a recording and then talk about  
18 it.

19 THE COURT: Understood. We understand.

20 My current intention is not to use a questionnaire. I  
21 don't really find that they are terribly helpful.

22 Anything else?

23 Thank you all.

24 (Adjourned)